NO. 147

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1950

THE STATE OF WEST VIRGINIA, at the Relation of DR. N. H. DYER, Et Al., Etc., Petitioners,

v.

EDGAR B. SIMS, Auditor of the State of West Virginia.

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of the State of West Virginia.

## BRIEF FOR THE COMMONWEALTH OF PENNSYLVANIA AS AMICUS CURIAE IN SUPPORT OF PETITION.

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### STATEMENT

The Attorney General of Pennsylvania adopts the statement in the petition of the State of West Virginia, but submits additional facts to show that Pennsylvania has a real and substantial interest in securing a ruling that the State of West Virginia is bound by the provisions of the Ohio River Valley Water Sanitation Compact.

The Monongahela River and its tributaries rise in West Virginia. The Monongahela is joined by the Cheat River at a point in Pennsylvania near the boundary between West Virginia and Pennsylvania and then flows through Pennsylvania to Pittsburgh where it meets the Allegheny River to form the Ohio River.

The total length of the Monongahela River is 128.1 miles, of which 36.5 miles are in West Virginia and 91.6

miles in Pennsylvania. The total drainage area of the Monongahela River is 7340 square miles and of this area 4612 square miles are situated in West Virginia and 2728 square miles in Pennsylvania.

The Monongahela River provides water for public water supplies in Pennsylvania serving a total population of 465,090 persons.

Fifty municipalities in West Virginia, having a population of 500 or more, discharge wastes by sewers into the Monongahela River.

Sixty-five industrial establishments in West Virginia contribute wastes through sewers into the Monongahela. Of these industries, twelve are coal washeries contributing silt and six are industrial plants contributing wastes of a chemical nature.

Under appropriate legislation Pennsylvania is requiring the treatment of sewage and of industrial wastes, including silt from bituminous coal mines.

Article VI of the Compact expressly provides that all sewage from municipalities or other political subdivisions, public or private institutions or corporations, discharged or permitted to flow into portions of the Ohio River and its tributaries, including waters which flow from one signatory state into another signatory state, as well as all industrial wastes which are permitted to flow into such waters, shall be treated before being discharged into such waters (Petition, pp. 40-41).

Failure of West Virginia to treat sewage and industrial wastes, as provided in the Compact, will very substantially lessen the effect of the program of Pennsylvania for the purification of streams.

## ARGUMENT

### Federal Questions Presented.

(A) Construction of the Compact, and particularly in the following respects:

(1) Whether the adoption of the contract by the State of West Virginia amounts to a surrender or delegation of its police power, especially in view of the following provisions of the Compact.

Article IV—

"* * * The commissioners from each State shall be chosen in the manner and for the terms provided by the laws of the States from which they shall be appointed * * *." (W. Va. Petition, p. 39)

Article IX—

"* * * no such order upon a municipality, corporation, person or entity in any State shall go into effect unless and until it receives the assent of not less than a majority of the commissioners from such state." (p. 43)

(2) Whether the provisions of the Compact violate the following sections of Article X of the Constitution of West Virginia.

Section 3—

"No money shall be drawn from the treasury but in pursuance of an appropriation made by law, and on a warrant issued thereon by the Auditor; nor shall any money or fund be taken for any other

purpose than that for which it has been or may be appropriated or provided. A complete and detailed statement of the receipts and expenditures of the public monies shall be published annually."

Section 4—

"No debt shall be contracted by this State, except to meet casual deficits in the revenue, to redeem a previous liability of the State; to suppress insurrection, repel invasion or defend the State in time of war; but the payment of any liability other than that for the ordinary expenses of the State, shall be equally distributed over a period of at least twenty years."

Section 6—

"The credit of the State shall not be granted to, or in aid of any county, city, township, corporation or person; nor shall the State ever assume, or become [fol. 32] responsible for the debts or liabilities of any county, city, township, corporation or person; nor shall the State ever hereafter become a joint owner, or stockholder in any company or association in this State or elsewhere, formed for any purpose whatever." (R. 23-24)

The pertinent provisions of the Compact are the following:

Article V—

"The Commission shall submit to the Governor of each State, at such time as he may request, a budget of its estimated expenditures for such period as may be required by the laws of such State for presentation to the legislature thereof.

* * * * * * *

"The Commission shall not incur any obligations of any kind prior to the making of appropriations adequate to meet the same; nor shall the Commission pledge the credit of any of the signatory States, except by and with the authority of the legislature thereof." (Petition p. 40)

Article X—

"The signatory States agree to appropriate for the salaries, office and other administrative expenses, their proper proportion of the annual budget as determined by the Commission and approved by the Governors of the signatory States * * *." (Petition p. 43)

It will be necessary for this court to interpret each of the clauses of the Compact quoted above and determine the legal effect of such clause, before the court can decide whether the Compact does conflict with the Constitution of West Virginia.

That the construction of an interstate compact presents a Federal question is no longer open to argument.

In *Delaware River Joint Toll Bridge Commission v. Colburn*, 310 U. S. 419 (1940), this court, by Mr. Justice Stone, said:

"* * * we now conclude that the construction of such a compact sanctioned by Congress by virtue of Article I, § 10, Clause 3 of the Constitution, involves a federal 'title, right, privilege, or immunity' which then 'specially set up or claimed' in a state court may be reviewed here on certiorari under § 237 (b) of the Judicial Code, 28 U.S.C. § 344, 28 U.S.C.A. § 344 (b). * * *" (427)

(B) The validity of the compact and of the provisions quoted *supra* in questions (A), (1) and (2).

The compact is an act of the signatory states and is an act of the State of West Virginia.

In order to determine the validity of the compact it becomes necessary for this court to determine the legality of the act of West Virginia in executing such compact and to decide whether the State of West Virginia, in view of the provisions of its constitution, lacks capacity to enter into the compact.

So in deciding the question of validity of an ordinary contract, the court must pass upon the legality of the act of each party in signing the same; for example, whether a party signing is *sui juris*, or whether the execution by an agent was in excess of his authority.

Every argument in favor of holding that the construction of a Compact involves a Federal question, applies with equal cogency to a question of its validity.

That the validity of an interstate Compact presents a Federal question was ruled in *Hinderlider v. La Plata Co.*, 304 U. S. 92 (1938). In that case the Supreme Court of Colorado had held that a provision in a compact between that state and New Mexico, for apportionment of a river between the two states, was in violation of Section 25 of the Colorado Constitution, which declared that the water of a stream not previously appropriated was the property of the people of the state and the right to divert the same should never be denied, and that the compact was unconstitutional (pp. 99, 104).

This court has repeatedly held that in order to determine whether the obligation of a contract has been impaired, this court will examine the record and determine for itself whether a contract was legally made and is binding on the party. Otherwise, the constitutional guarantee could be readily evaded by a decision of a state court that no contract existed. See *Kentucky v. Indiana,* 281 U. S. 163, 176-177 (1930).

The same urgency exists in this case. If a State can escape liability under a contract by a ruling of its courts that its execution was *ultra vires,* the exercise of the power of Congress under the Compact clause of the Federal Constitution will be thwarted and nullified.

(C) Whether after a state has assumed obligations by entering into an interstate compact and Congress has approved such contract, the state may disable itself, by decision of its highest court or by act of any other governmental agency, from performing such obligations.

Prior to the adoption of the Federal Constitution every state, as part of its sovereignty, had inherent power to enter into compacts with other states:

*Poole v. Fleeger,* 11 Peters 185, 209 (1837);
*Rhode Island v. Massachusetts,* 12 Peters 657, 725 (1830).

The Compact Clause of the Constitution necessarily recognized and affirmed the existence of this power in the states:

*Poole v. Fleeger,* 11 Peters 185, 209 (1837);
*Virginia v. West Virginia,* 246 U. S. 565, 601, 602 (1918).

It is submitted that a state may not, by adopting a Constitution, or by decision of its highest court interpreting such Constitution, disable itself from participating in an interstate compact or performing its obligations thereunder.

In *Virginia v. West Virginia, supra,* the State of West Virginia had been created out of the State of Virginia and had been admitted to the Union by an enabling Act of Congress which expressly made it a condition of such admission that West Virginia pay a proportionate part of the indebtedness of the State of Virginia as provided in a compact between the two states.

The State of West Virginia failed to pay such sum. Its Legislature failed to levy taxes to provide a fund for such payment, and the State of Virginia filed an original suit in this court to compel performance of the compact by the State of West Virginia.

West Virginia set up in defense that it could not be controlled by judicial process or be compelled to levy a tax to create a fund to pay a judgment in favor of Virginia.

This court sustained the compact and the power of this court to enforce the same.

In the opinion, Chief Justice White said:

> "The State, then, as a governmental entity, having been subjected by the Constitution to the judicial power under the conditions stated, and the duty to enforce the judgment by resort to appropriate remedies being certain, even although their

exertion may operate upon the governmental powers of the State * * * (600)

* * * * * * *

"The vesting in Congress of complete power to control agreements between States, that is, to authorize them when deemed advisable and to refuse to sanction them when disapproved, clearly rested upon the conception that Congress, as the repository not only of legislative power but of primary authority to maintain armies and declare war, speaking for all the States and for their protection, was concerned with such agreements, and therefore was virtually endowed with the ultimate power of final agreement which was withdrawn from state authority and brought within the federal power. It follows as a necessary implication that the power of Congress to refuse or to assent to a contract between States carried with it the right, if the contract was assented to and hence became operative by the will of Congress, *to see to its enforcement.* * * * (601)

"Having thus the power to provide for the execution of the contract, it must follow that the power is plenary and complete, limited of course, as we have just said, by the general rule that the acts done for its exertion must be relevant and appropriate to the power. This being true, it further follows, as we have already seen, that, by the very fact that the national power is paramount in the area over which it extends, the lawful exertion of its authority by Congress to compel compliance with the obligation resulting from the contract between the two States which it approved is not circumscribed by the powers reserved to the States.

> Indeed, the argument that the recognition of such a power in Congress is subversive of our constitutional institutions from its mere statement proves to the contrary, since at last it comes to insisting that any one State may, by violating its obligations under the Constitution, take away the rights of another and thus destroy constitutional government. * * *" (Italics supplied) (602)

An analogy is furnished by the decisions of this court in which it has been frequently held that a condition in an enabling Act of Congress which would deny a new state any of the powers possessed by other states, is unconstitutional.

Thus in *Coyle v. Oklahoma,* 221 U. S. 559 (1911), the enabling act for the admission of the new State of Oklahoma required that its capital be located in a named city.

In holding this condition unconstitutional, this court, by Mr. Justice Lurton, said:

> "'This Union' was and is a union of States, equal in power, dignity and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself. To maintain otherwise would be to say that the Union, through the power of Congress to admit new States, might come to be a union of States unequal in power, as including States whose powers were restricted only by the Constitution, with others whose powers had been further restricted by an act of Congress accepted as a condition of admission. * * * (567)

* * * * * * *

"The plain deduction from this case is that when a new State is admitted into the Union, it is so admitted with all of the powers of sovereignty and jurisdiction which pertain to the original States, and that such powers may not be constitutionally diminished, impaired or shorn away by any conditions, compacts or stipulations embraced in the act under which the new State came into the Union, which would not be valid and effectual if the subject of congressional legislation after admission. (573)

* * * * * * *

"To this we may add that the constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized. When that equality disappears we may remain a free people, but the Union will not be the Union of the Constitution." (580)

The opinion also quoted (p. 575) the following language of Mr. Justice Field in *Escanaba Co. v. Chicago*, 107 U. S. 678 (1882):

"* * * Equality of constitutional right and power is the condition of all the States of the Union, old and new. * * *" (689)

This decision holds that the people did not intend that Congress should have the power, or be permitted, to impose a disability upon a state before its admission, or as a condition precedent to its admission. With equal cogency it may be reasoned that the people did not intend that after a state had been admitted, some authority thereof—the Legislature or the Supreme Court, or even the people of the state, by constitutional amendment—should be allowed to disable the state from exercising an inherent power which all states possessed,

or from performing an obligation which the state had assumed or to impose any restriction on the power of the state to do so.

A new state upon admission is as fully sovereign and has the same powers as the thirteen original states or any other state. Congress may not impose any limitation upon the sovereignty of the new state, by disability or otherwise. The same reasoning applies to any self-imposed limitation or disability. There will be an even greater temptation to the people of the state to take some short-sighted action believed to further its selfish interests, than to Congress which is made up of representatives of every state and is less inclined to favor a local interest.

A state whose constitution is weakened by restrictions or disabilities is just as unfit for membership in the Union whether the same are imposed by an Act of Congress or by a clause of the State Constitution.

The restriction held invalid in *Coyle v. Oklahoma, supra,* affected only the internal management of that state. The restriction imposed by the Constitution or a judicial decision in West Virginia would hinder, if not wholly defeat, the purpose and performance of a compact in which other states are interested.

Respectfully submitted,

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